Supreme Court, U.S.
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No. 97-1321

In The

Supreme Court of the United States

October Term, 1997

HOLLINGSWORTH & VOSE COMPANY,

Petitioner,

v.

MILTON HOROWITZ and SHIRLEY HOROWITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner Hollingsworth & Vose fails to invoke this Court's jurisdiction because it fails to demonstrate that the California Court of Appeal's decision below decided a federal question.

II. Whether the California Court of Appeal's factual determination that the Respondents' complaint sufficiently pled a fraud cause of action against Petitioner fails to present an important federal question that either must be settled by this Court or conflicts with other court decisions.

III. Whether the state court properly affirmed the judgment against H&V because H&V received adequate notice of the fraud claim and, in any event, any error failed to prejudice H&V.

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JURISDICTION

Respondents Milton Horowitz and Shirley Horowitz (Horowitz) dispute Petitioner Hollingsworth & Vose Company's (H&V) claim that this Court has jurisdiction over this matter under 28 U.S.C. section 1257. H&V fails to demonstrate that the California courts decided any federal questions and thus fails to invoke the jurisdiction of this Court. Accordingly its Petition should be rejected. *See* Reasons For Denying The Writ, Section I, *post*.

STATEMENT OF THE CASE

I. Introduction.

H&V's Petition is fundamentally flawed because it mischaracterizes the holding of the California Court of Appeal decision from which its Petition is taken. H&V asserts that the state court "dispense[d] with a long-standing rule of state civil procedure" to hold that "a trial judge may properly submit an unpled and untried fraud claim to the jury." Petition at p. i (Questions Presented); *see* Petition at p. 22 (asserting appellate court error in "abrogating established rules of procedure").

The court below *did not* "dispense" with a state pleading rule and *did not* hold that a trial judge may submit an unpled fraud claim to a jury. On the contrary, the state court affirmed the trial court finding that, *under the pleading rules* of California civil procedure, Horowitz "sufficiently ple[d] a cause of action for fraud against H&V." Petition, Appendix A at p. 29a.

H&V's mischaracterization of the state court's holding permeates its Petition, which must be denied for three reasons:

(1) H&V fails to invoke this Court's jurisdiction by failing to demonstrate that the state court decided *any* federal question whatsoever.

(2) H&V fails to demonstrate that the state court decided an "important" federal question that either must be settled by this Court or conflicts with other law.

(3) The state court properly affirmed the trial court judgment because (a) H&V received adequate notice of Horowitz' fraud claim, and (b) any trial court error failed to prejudice H&V because the judgment is independently supported by jury findings that H&V was liable on four other causes of action.

II. Factual Background.

In the early 1950's, H&V and P. Lorillard Company (Lorillard), defendants below, jointly manufactured cigarette filters containing 30% crocidolite asbestos, the most deadly asbestos in the world. RT 874-875, 896-897, 933-994, 996-997, 1513-1515. H&V and Lorillard entered into a "Supply Agreement" under which H&V supplied Lorillard with asbestos-laden filter material, which Lorillard cut and placed on tobacco rods to form filtered cigarettes. Exh. 105; RT 996:10-24; 1513:22-24. H&V and Lorillard also agreed to share in all aspects of this joint

cigarette production, including manufacturing, marketing, shared technology, patent ownership, and shared liability. Exh. 105. From 1952 to 1956, defendants manufactured and marketed these asbestos-filtered cigarettes nationally as "Kent" brand cigarettes.

Both H&V and Lorillard knew, however, that their Kent filters released deadly asbestos fibers into the smoke that Kent smokers inhaled into their lungs. Exhs. 42, 42A-BB, 43, 43A-O (Lorillard and H&V correspondence admitting asbestos release). But defendants callously mounted an aggressive advertising campaign that (1) falsely claimed that the filters were "safe," "harmless", and offered the "greatest health protection" in history, but (2) *never* informed the public that the filters contained (let alone released) asbestos. *See* Exhs. 16A-M, 17A-L, 18A-J (Kent advertisements that do not mention asbestos); Deposition of William Thompson 42:17-43:5; 46:9-10. In fact, defendants boasted that Kent filters contained a "secret mineral" and "an amazing mineral filtering material," without disclosing that the mineral was asbestos. Exhs. 16D, 16E, 185; RT 1961:16-1962:3.

Defendants targeted this advertising at professionals over 30 years old, who assumedly would respond to health claims and be willing to spend extra money for the asserted "health protection." Thompson Depo. 145:9-20.

One of defendants' targets was Dr. Milton Horowitz, who in 1952 was a 29 year-old professional psychologist. Defendants' fraudulent advertising claims that Kent filters were "safe" and offered "health protection" induced Dr. Horowitz to smoke Kents from 1952 to 1956 and beyond. RT 1112:14-1113:7.

In 1994, Dr. Horowitz was diagnosed with terminal mesothelioma, a cancer of the lung lining invariably caused in the United States by asbestos exposure. RT 524:14-18. Expert testimony established that asbestos released from Defendants' Kent cigarettes caused Dr. Horowitz' mesothelioma, RT 512:15-21, 529:2-5, 927:6-8, 928:18-21, killing him shortly after trial in 1996.

III. State Court Proceedings.

Dr. Horowitz and his wife, Shirley Horowitz, sued H&V and Lorillard (and other defendants) in California Superior Court, alleging causes of action for negligence, three forms of strict products liability,[1] enterprise liability, false representation, loss of consortium, and fraud, and requesting compensatory and punitive damages. Petition, Appendix D at pp. 49a-66a. In the complaint, Horowitz alleged the fraud cause of action against Lorillard only, but alleged the false representation and punitive damages causes of action against both H&V and Lorillard. *Id.* at pp. 58a-66a. The punitive damages cause of action incorporated the fraud cause of action by reference and alleged that H&V intentionally concealed its knowledge of the "high risk of injury or death" from

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[1] California recognizes three types of causes of action for strict products liability: (1) consumer expectation (product fails to perform as safely as reasonable consumer would expect), (2) risk/benefit (product's risks outweigh product's benefits), and (3) failure to warn (manufacturer failed to warn adequately of product's inherent dangers). *Anderson v. Owens-Corning Fiberglas Corp.*, 281 Cal.Rptr. 528, 532-533, 53 Cal.3d 987, 995 (Cal. 1991); *Barker v. Lull Engineering Co.*, 143 Cal.Rptr. 225, 234, 20 Cal.3d 413, 426-427 (Cal. 1978).

asbestos and "consciously and actively concealed and suppressed" that knowledge from the public. *Id.* at pp. 44a-46a.

Once Horowitz learned that H&V and Lorillard had agreed in the 1950's to share in all aspects of manufacturing and marketing Kents, he informed H&V several times, without objection, that he was asserting the fraud claim against it.

First, Horowitz told H&V in a pre-trial brief that he was making a punitive damages claim "against both Lorillard and Hollingsworth & Vose based upon their malicious *and fraudulent* conduct." CT 2396:7-11 (emphasis added). H&V failed to oppose this assertion either before or during trial.

Second, on the first day of trial, before jury selection, Horowitz' counsel informed the court and opposing counsel that he was proceeding "on fraud and misrepresentation against them [both H&V and Lorillard]." RT 9:15-21. H&V failed to object.

Third, during opening statement Horowitz' counsel repeatedly announced to the jury that Horowitz was pursuing a fraud claim against H&V, again without objection. RT 358:17-24 ("This is a case about the big lie that *these companies* told . . . in *their* advertising); RT 375:15-27 ("The evidence will show that *the defendants* are responsible . . . because *they* fraudulently, falsely and misleadingly advertised this product as pure, safe, harmless and dust-free."); RT 383:14-18 ("And we will ask you at

the end of this case to award punitive damages . . . for the fraud that *they* committed.").[2]

The jury found both H&V and Lorillard liable on every cause of action submitted to it – negligence, all three forms of strict products liability, and fraud – and awarded Horowitz $1.3 million in compensatory damages. Petition, Appendix G at pp. 78a-90a. The jury also found that both defendants committed "malice, oppression or fraud" and accordingly assessed punitive damages of $560,000 against Lorillard and $140,000 against H&V. *Id.* at pp. 87a-89a.

The California Court of Appeal affirmed the judgment against H&V and Lorillard in all respects. Petition, Appendix A at pp. 1a-32a. The California Supreme Court denied discretionary review of the appellate court decision. Petition, Appendix B at p. 33a.

REASONS FOR DENYING THE PETITION

I. H&V FAILS TO INVOKE THE JURISDICTION OF THIS COURT.

This Court should reject H&V's Petition because H&V fails to invoke the jurisdiction of this Court.

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[2] H&V thus errs when it claims to this Court that "[a]fter the evidence had closed, [Respondents] asserted for the first time a fraud claim against H&V which [they] neither pled in their complaint nor raised at any point in the pre-trial or trial proceedings." Petition at p. 3.

H&V asserts jurisdiction over the "judgment of the Court of Appeal of California" under 28 U.S.C. section 1257. Petition at p. 2.

Section 1257 authorizes this Court to review the final judgment of a state's highest court only when that judgment *decides* a substantial federal question. This Court's jurisdiction is not invoked here because the California Court of Appeal *did not decide* a federal question.

The state decision itself did not discuss or decide *any* federal question. *See* Petition, Appendix A, pp. 1a-32a. Regarding H&V's claim that Horowitz failed to allege a fraud cause of action against it, the state court discussed no federal law and held that Horowitz' complaint "sufficiently pleads a cause of action for fraud against H&V" under California law. Id. at p. 29a (citing California case law).

H&V may contend that it raised a federal due process question with the state courts in its appellate brief. *See* Petition, Appendix H at pp. 93a-94a. But because the state court "failed to pass upon [the] federal question," this Court *"assume[s]* that the omission was due to want of proper presentation in the state courts, unless the [Petitioner] in this Court can *affirmatively show* the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354 (1969) (emphasis added).

A Petitioner must make this showing by specifying in the "Statement of the Case" of its Petition (1) the "stage in the [state] proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were *raised*," (2) the method or manner of raising them and the way in which

they were passed on by those courts," and (3) "pertinent quotations of specific portions of the record . . . , with specific reference to the places in the record where the matter appears, so as to *show* that the federal question was *timely and properly raised* and that this Court *has jurisdiction* to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g)(i) (emphasis added).[3]

H&V fails to meet its burden of demonstrating that it raised in the state courts the federal constitutional issue it now asserts. H&V appends an excerpt of its Opening Brief in the state court of appeal, in which it asserted with little analysis that the trial court's submission of the fraud claim against H&V to the jury "violated the due process guaranty of the Fourteenth Amendment to the United States Constitution." Petition, Appendix H at p. 93a. This is insufficient, however, to invoke this Court's jurisdiction because H&V fails to *show* that it *properly* raised this issue in the state court of appeal.

In fact, H&V failed to raise properly in the court of appeal its asserted constitutional issue. In California civil cases, "constitutional questions not raised in the trial court are considered waived" on appeal. *Hepner v. Franchise Tax Bd.*, 61 Cal.Rptr.2d 341, 52 Cal.App.4th 1475, 1486 (Cal.Ct.App. 1997).[4] H&V *never* raised in the trial

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[3] All further references in this Opposition Brief to "Rule" are to the Supreme Court Rules unless specified otherwise.

[4] *Accord In re Frederick B.*, 237 Cal.Rptr. 338, 192 Cal.App.3d 79, 90 (Cal.Ct.App. 1987); *Selleck v. Globe International, Inc.*, 212 Cal.Rptr. 838, 166 Cal.App.3d 1123, 1132 n.5 (Cal.Ct.App. 1985); *In re Marriage of Fuller*, 210 Cal.Rptr. 73, 163 Cal.App.3d 1070,

court the federal constitutional issue that it tried to raise on appeal and asserts here. Petition, Appendix E at pp. 67a-74a (H&V's oral motion for nonsuit on fraud claim, no constitutional issue raised); Appendix A to this Brief in Opposition, pp. App. 1-App. 21 (CT 2082-2097) (H&V's motion for new trial, no constitutional issue raised); Appendix B at pp. App. 22-App. 28 (CT 2459-2463) (H&V's new trial reply brief, no constitutional issue raised). Thus H&V was barred from raising its asserted federal issue in the state appellate court.

Because the state court of appeal was completely silent on H&V's asserted federal issue, this Court assumes that this silence was due to H&V's procedural error in raising the federal issue. *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66 (1945); *Street v. New York, supra*, 394 U.S. at 582.

Thus the state appellate court opinion from which H&V takes its Petition did not decide a federal question. H&V thus fails to invoke this Court's jurisdiction, and this Court accordingly should reject H&V's Petition.

II. H&V MERELY ASSERTS STATE COURT ERROR AND FAILS TO DEMONSTRATE A "COMPELLING REASON" WHY THIS COURT SHOULD GRANT CERTIORARI.

Even if this Court concludes that, despite H&V's defective showing, the state court "decided" a federal question and invoked this Court's jurisdiction, H&V's Petition should be denied because H&V fails to show a

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1076 (Cal.Ct.App. 1985); *Fleming v. Safeco Ins. Co.*, 206 Cal.Rptr. 313, 160 Cal.App.3d 31, 43 (Cal.Ct.App. 1984).

"compelling reason" why this Court should grant certiorari. *See* Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

H&V fails to demonstrate either of the bases for a grant of certiorari from a state court decision, that either (1) the state decision raises an "important question of federal law" that this Court must settle, or (2) the state decision "has decided an important federal question in a way that conflicts" with a decision of either this Court, a United States court of appeals, or another state court of last resort. *See* Rule 10(b) and (c). At most, H&V asserts that the California Court of Appeal *misapplied* California's "properly stated" pleading rules, and review by this Court is thus not warranted.

A. H&V fails to demonstrate that the *unpublished* state court decision raises an "important question of federal law" that this court must decide.

This Court should deny H&V's Petition because H&V fails to raise an "important question of federal law" that this Court must decide.

H&V asserts that the state decision raises "important questions" about the "continued critical importance of due process notice" to mass tort defendants, "particularly in cases involving allegations of fraud," Petition at p. 4. H&V errs.

First, the state court's decision cannot affect any other litigants because it is *unpublished*. To warrant review by this Court, a federal question must be important "to the public as distinguished from" the particular

"parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422 (1923). The state court decision here, however, is important *only* to these parties because it is an unpublished opinion. Petition, Appendix A at p. 1a. In California, appellate court decisions that are not published may not be "cited or relied on" in "any other action." Cal. Rule of Court 977(a). The unpublished decision below thus has *no effect* on any other litigation anywhere. Hence, H&V's claim that "the decision below will have substantial and deleterious ramifications far beyond the particular parties and facts at issue in this case," Petition at p. 22, is simply wrong.

Second, although H&V contends that the decision below has "serious ramifications" for other defendants in "mass tort litigation," Petition at p. 2, H&V admits that this case is *atypical* and distinct from most mass tort cases, involving an "atypical" defendant, "atypical claims," and "unique claims" that are "entirely distinct from the typical claims of [asbestos] plaintiffs." Petition at p. 12. H&V fails to show how the state court's decision in this atypical case can or will have any effect on "typical" cases.

Third, even if this "atypical" case was published, it could not affect other litigants because it is decided *on its facts*. The appellate court affirmed the trial court factual finding that, under California pleading rules, H&V received sufficient notice of the fraud claim to submit the claim to the jury. Petition, Appendix A at p. 29a. This Court does not grant certiorari "to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496 (1925), particularly fact findings made by the trial court and affirmed by the appellate

court below. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535 (1949) (this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"). This Court thus should reject H&V's invitation to overturn the state trial and appellate court findings that H&V received sufficient notice of Horowitz' fraud claim against it to satisfy California's fraud-pleading requirements. *See* Petition, Appendix A at p. 29a.

Because H&V fails to raise any "important" federal questions affecting other litigants, its Petition should be denied.

B. H&V fails to demonstrate that the state court decision conflicts with decisions of this Court, the United States court of appeals, or any other state's court of last resort.

H&V fails to justify review by this Court because it fails to establish that the decision below "conflicts" with other decisions.

H&V erroneously asserts that the decision below "conflicts with this Court's decisions" requiring notice to defendants because it "sanctions the trial judge's submission of [the] fraud claim [to the jury] *even in the absence of adequate notice.*" Petition at p. 4 (emphasis added).

H&V errs because the decision below *did not* "sanction" claims without adequate notice to the defendant. On the contrary, the state court of appeal (1) restated California rules *requiring* that a defendant receive notice

of claims against it, and (2) affirmed the trial court finding of fact that H&V received adequate notice under these rules. Petition, Appendix A at pp. 28-29.

H&V does not argue that California's statutory pleading requirements are invalid or violate due process in any way. In fact, H&V concedes that "established" and "well-settled" California pleading rules protect defendants' due process rights. Petition at p. 4 (asserting that the courts below "arbitrar[ily]" failed to follow "*established* rules of state court procedure" and ignored "a *well-settled* state procedural rule which requires that claims of fraud be pled with specificity"). H&V even demonstrates that California's "settled" pleading requirements suffice to "provide an adversary with adequate notice when alleging a fraud claim." Petition at pp. 14-15.

Rather than showing a "conflict" between California pleading rules and federal, constitutional notice requirements, H&V demonstrates that California's rules *match* federal rules protecting due process. Petition at pp. 13-15. For example, H&V shows that "settled" California rules require specific fraud pleadings to provide the "notice to the defendant" required by decisions of this Court and lower federal courts. Petition at pp. 13-15 and n. 1 (favorably comparing pleading rules in California cases *Goldrich v. Natural Y Surgical Specialties, Inc.*, 31 Cal.Rptr.2d 162, 168, 25 Cal.App.4th 772, 782-783 (Cal.Ct.App. 1994) and *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 672, 35 Cal.3d 197, 216 (Cal. 1983), with rules stated in various federal cases).

After conceding that California pleading requirements satisfy federal due process requirements of notice,

H&V merely asserts that the state court *misapplied* California's constitutional rules to these facts. Petition at pp. 15 (state court "disregard[ed]" California's valid rules), 17 (state court's factual finding "cannot be reconciled" with state's valid rules). However, a certiorari petition is "rarely granted when the asserted error consists of erroneous factual findings or the *misapplication of a properly stated rule of law.*" Rule 10 (emphasis added).

The court below did not abrogate California's constitutional pleading requirements or declare that a defendant can be sued in California without notice and an opportunity to be heard. Such a ruling *would* "conflict" with the rulings of this and other courts. On the contrary, the court below *reaffirmed* California's pleading rules, which H&V admits are consistent with this Court's constitutional requirements, and then *applied* those rules to the facts. H&V's argument that the court applied California's constitutional rules erroneously does not warrant review by this Court.

Because H&V fails to demonstrate a compelling reason for review, this Court should deny H&V's Petition.

III. THE COURT OF APPEAL PROPERLY AFFIRMED THE JUDGMENT AGAINST H&V.

H&V's Petition should be denied finally because the state court of appeal properly affirmed the judgment against H&V. First, the courts below properly found that H&V had notice of the fraud claims against it. Second, even if the trial court erred in submitting the fraud claim to the jury, the court of appeal properly affirmed because

the judgment against H&V was supported by jury verdicts on four other causes of action, and thus H&V was not prejudiced in any way by the error asserted in its Petition.

A. The Court of Appeal properly affirmed the trial court finding that H&V had adequate notice of the fraud claim against it.

The courts below properly found that H&V had sufficient notice of the claims against it to satisfy due process.

Horowitz initially asserted the fraud cause of action against only Lorillard, who initiated the fraudulent advertising campaign that ensnared Dr. Horowitz with claims that asbestos-laden Kent cigarettes were "safe" and "harmless" and offered "health protection." Petition, Appendix D at pp. 63a-66a. Horowitz then asserted fraud against H&V when he learned that H&V and Lorillard shared all aspects of Kent cigarette manufacture and marketing. H&V received adequate notice of this fraud claim.

First, the complaint put H&V on notice that Horowitz accused H&V of fraudulent misrepresentations and fraudulent concealment. The punitive damages cause of action against both H&V and Lorillard (1) incorporated the allegations that Kent's marketing advertisements were fraudulent, and (2) specifically accused H&V of "marketing" asbestos-laden Kents while "intentionally" concealing its knowledge that they were deadly, with "conscious disregard" for consumers' safety. *Id.* at pp. 60a-61a. Moreover, the fourth cause of action for "False Representation" specifically alleged that H&V "marketed" and "offered for sale" asbestos-laden Kents with

"false and untrue" representations that Kents were "safe", and these "false representations" injured Dr. Horowitz. *Id.* at pp. 58a-59a.

Second, Horowitz clarified any possible ambiguity in his claims against H&V by repeatedly notifying H&V before and during trial that he accused H&V of fraud. In a pre-trial brief, Horowitz notified the court that he was suing H&V for its "*fraudulent* conduct." CT 2396:7-11 (emphasis added). On the first day of trial, Horowitz asserted that he was proceeding "on fraud and misrepresentation against them [both H&V and Lorillard]." RT 9:15-21. In opening statement, Horowitz repeatedly announced to the jury he was pursuing a fraud claim against H&V based on Kent advertising. RT 358:17-24 ("these companies" told a "big lie" in "their" advertising); RT 375:15-27 ("defendants . . . fraudulently, falsely and misleadingly advertised" Kents); RT 383:14-18 (requesting punitive damages for "the fraud that they committed."). H&V failed to object to *any* of these pretrial and trial assertions, each of which notified H&V unambiguously that Horowitz was proceeding against H&V for its fraud.

Thus, the courts below properly found that H&V had notice that it was being sued for fraud.

B. The Court of Appeal properly affirmed the judgment because H&V was not prejudiced by the asserted pleading error.

Even if there was a technical defect in Horowitz' fraud claim against H&V, the Court of Appeal properly

affirmed the trial court judgment because H&V was not prejudiced.

First, the jury found H&V liable on four other causes of action besides fraud, including negligence and all three forms of strict products liability. Petition, Appendix G at pp. 79a-86a. Similarly, the jury assessed punitive damages based on H&V's malice, oppression, *or* fraud. *Id.* at pp. 87a-88a. If a California jury finds a defendant liable on several causes of action, the court of appeal must sustain the judgment if "*any*" cause of action is "supported by substantial evidence and is unaffected by error, despite possible insufficiency . . . as to the remaining counts." *Tavaglione v. Billings*, 17 Cal.Rptr.2d 608, 613, 4 Cal.4th 1150, 1157 (Cal. 1993). Thus, even if error affected the fraud claim, the appellate court properly affirmed the judgment based on the other error-free claims that were supported by the evidence.

Second, H&V failed to demonstrate to the court of appeal that it would have presented any different evidence had it had better notice of the fraud claim. In fact, H&V contended on appeal that "no evidence existed" that H&V committed fraud, thus asserting that it had presented a complete defense to the fraud claim. Petition, Appendix H at p. 98a. H&V thus failed to show how its defense would have differed if the complaint had specifically alleged fraud against it.

H&V thus failed to demonstrate that it would not have received *exactly* the same judgment absent the asserted error. Under the California Constitution and California law, an appellate court cannot reverse a judgment based on error unless it is "probable" that the jury would

have reached a different verdict absent the error. California Constitution, Art. VI, § 13; Cal. Code of Civil Procedure § 475. Under these authorities, the state appellate court properly affirmed the trial court judgment because it was not probable that the judgment against H&V would have differed in any way absent the asserted error in submitting the fraud claim to the jury.

CONCLUSION

H&V continues to cling to the desperate hope that it will not be held accountable for its appalling conduct in placing deadly asbestos in a cigarette filter and then marketing the filter to the late Dr. Horowitz and millions of other consumers as "safe" and "harmless" and offering "health protection," despite H&V's specific knowledge that the filter released asbestos into smokers' lungs.

H&V's Petition must be denied for three reasons.

First, H&V fails to invoke this Court's jurisdiction because it fails to show that the California courts decided *any* federal question. This Court should reject H&V's Petition for this reason.

Second, even if this Court has jurisdiction, H&V fails to demonstrate that review by this Court is warranted. H&V raises neither an "important" federal question with an effect beyond these parties nor a "conflict" between California law and federal due process protections. H&V concedes that California's "well-settled" law protects defendants' due process rights but merely argues that the courts below misapplied the constitutional state rules.

Third, even if the state courts committed error, H&V fails to demonstrate that the error tainted the judgment in any way. The trial and appellate court findings of fact that H&V received notice of the fraud claim are supported by the evidence. Moreover, H&V was not prejudiced by any error because the judgment was independently supported by H&V's liability on four other causes of action.

Accordingly, H&V's Petition should be denied.

Dated: March 16, 1998.

Respectfully submitted,

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ Plaintiffs, v. RAYBESTOS-MANHATTAN, INC., et al. Defendants.	No. 965245 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HOLLINGSWORTH & VOSE COMPANY'S MOTION FOR NEW TRIAL** Date: November 6, 1995 Time: 2:00 p.m. Dept.: 1 (TBA) Judge: Winton McKibbon (X-5) (Filed Oct. 20, 1995)

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I.

INTRODUCTION

On September 1, 1995, the jury in the above-captioned action returned a Special Verdict in favor of plaintiffs Milton and Shirley Horowitz. Judgment was entered on September 21, 1995. By this Memorandum of Points and Authorities, Hollingsworth & Vose Company ("H&V") asks this Court to set aside the verdict and judgment entered thereon, and to grant a new trial because (1) the expert opinion evidence of Elise Comproni was admitted without sufficient foundation; (2) the weight of the evidence presented at trial was insufficient to justify a finding of negligence, and (3) the jury was permitted to deliberate on plaintiffs' fraud claims against H&V despite plaintiffs' failure to plead such claims or present any supporting evidence.

In addition, in order to avoid duplication, H&V hereby joins in Lorillard, Inc.'s Memorandum of Points and Authorities In Support of its Motion for New Trial to the extent Lorillard's Memorandum presents issues applicable to H&V. H&V specifically incorporates as though fully set forth herein Lorillard's Memorandum, Sections II and III.

Section II, addressing the insufficiency of plaintiffs' evidence that Milton Horowitz smoked "Old" Kents, is equally applicable to H&V because any claim against H&V necessitates, as a threshold requirement, a showing that Milton Horowitz smoked "Old" Kent cigarettes which employed H&V's asbestos-containing filter media. Section III, addressing plaintiffs' counsel's improper conduct, is also applicable to H&V because each of the incidents discussed involves plaintiffs' improper inferences and assertions directed against both Lorillard *and* H&V.

II.

ARGUMENT

A. The Admission of Deposition Testimony Of Elise Comproni Into Evidence Without A Legally Sufficient Foundation Was Prejudicial Error [CCP 657(1) And CCP 657(7)].

During opening statements and closing arguments, plaintiffs repeatedly referred to the deposition testimony of Elise Comproni, an inspector with the Massachusetts Department of Labor and Industries, Division of Occupational Hygiene ("DOH"). In 1991, Mr. Comproni testified via deposition that in 1953, then one year out of college with no specialized training or knowledge, he was "appalled" at the use of asbestos in Kent cigarette filter media. Despite defendants' timely objection and the undisputed testimony establishing Mr. Comproni's complete lack of qualifications to opine on the hazards of asbestos and asbestos-containing products, plaintiffs were permitted to read this testimony to the jury. Moreover, the Comproni testimony, given the prominence

placed upon it by plaintiffs' repeated references, prevented defendants from receiving a fair trial.

1. Elise Comproni Was Not Qualified To Give an Opinion Concerning the Potential Hazards of an Asbestos-Containing Filter in the Early 1950s.

When Elise Comproni visited the H&V Specialties plant in 1953, he was a recent graduate of the Plymouth State College in Plymouth, New Hampshire. (4/16/91 Deposition of Elise Comproni, at 60-61, CCR Exhibit A, Tab 1; R.T., at 1288, CCR Exhibit B, Tab 1).[1] He graduated with a bachelor of education degree, a degree one obtains before becoming a high school teacher. (Comproni Depo., at 60, CCR Exhibit A, Tab 1). He took no courses in industrial hygiene and studied nothing even remotely related to the hazards associated with asbestos. (Comproni Depo., at 62, CCR Exhibit A, Tab 1). Mr. Comproni was simply unqualified to form or give any sort of opinion regarding the potential hazards of an asbestos-containing filter in the early 1950s. Nevertheless, the Court permitted plaintiffs to read Mr. Comproni's opinion testimony to the jury:

> Q. Given your position with the Commonwealth of Massachusetts at that point, how did you react to the fact that they were putting cigarette – asbestos in the cigarette filters?

---

[1] Throughout this memorandum "R.T." refers to the Reporter's Transcript and "CCR Exhibit" refers to the exhibit attached to the Declaration of Cynthia C. Roenisch and its included tabbed attachments.

> A. Well, we were appalled at this sort of thing but it is beyond our power to do anything about that. . . .

(Comproni Depo., at 51-52, CCR Exhibit A, Tab 2; R.T., at 1322-1323, CCR Exhibit B, Tab 2).

In order to give an expert opinion, a person must have "special knowledge, skill, experience, training, or education." Evid. Code § 720(a). Plaintiffs failed to demonstrate any such knowledge, skill, experience, training, or education which Mr. Comproni held in 1953. Because he had no such contemporaneous expertise with which to give an opinion on the then-existing knowledge concerning the safety of Asbestos-containing filters, his opinion should not have been admitted.

The Court improperly permitted the opinion testimony to be read to the jury despite plaintiffs' failure to lay a proper foundation and despite defendants' timely objection:

> THE COURT: Okay. (Pause.) All right what do you want to say. I read the pages you referred to me, page 59 and 71 with respect to his experience and qualifications.
>
> MR. BRAKE: My contention was, your honor, that the opinion he gave on pages 51 and 52, he was asked about, essentially, what did you think about the fact they were manufacturing cigarette filters using asbestos? He goes on to says (sic), "we", apparently referring to himself, was appalled; went on to discuss that.
>
> My point is he is giving a scientific technological opinion there. He simply is not properly qualified to do, improper opinion testimony.

> If you read the pages to which plaintiff reference, he is one year out of Plymouth state with an education degree, just started working there.
>
> If he came in here, tried to give that opinion, you won't let him do it. It is my opinion, you shouldn't let him. . . .
>
> THE COURT: I will permit the opinion.

(R.T., at 1288-89, CCR Exhibit B, Tab 3).

2. Plaintiffs' Use of the Inadmissible Comproni Testimony Unduly Prejudiced Defendants and Prevented Defendants From Receiving a Fair Trial.

Plaintiffs repeatedly referred to Mr. Comproni's alleged assessment that, given his knowledge in 1953, he considered the use of asbestos in a cigarette filter at the time to be "appalling." Plaintiffs' counsel cited the reference in her opening statement and repeated it again in closing argument:

> And you will hear, either, hopefully from the witness stand or in the form of a deposition read to you, prior testimony taken from a [sic] Elise Comproni, who inspected that plant, who will tell you that he was appalled by what they were doing with the asbestos, something that could be inhaled into the lungs, but that he was powerless to do anything about it. And that in the 1950s. He was unwilling to champion a cause, go public with it, go to the press. He didn't have any powers, under the Massachusetts Department of Labor, to close them down. They weren't doing anything illegal.

(Plaintiffs' Opening Statement, R.T., at 363-64, CCR Exhibit B, Tab 4).

* * *

> And when Elise Comproni remember I read his deposition, inspected the H & V plant, his testimony was that he was appalled by the use of asbestos in cigarette filters. That wasn't his job.
>
> His job was to inspect work places and maybe he should have been a champion, maybe he should have been a hero.
>
> When they asked him the question about whether, did you go to the Boston Globe. People didn't do that in the 1950's. They stayed within their jobs and that was to his role to do that.

(Plaintiffs' Closing Argument, R.T., at 2089-90, CCR Exhibit B, Tab 5).

As these excerpts indicate, plaintiffs employed Mr. Comproni's unqualified expert opinions as the anchor for their "state of the art" case. Plaintiffs claimed that Mr. Comproni's testimony proved the state of knowledge in the early 1950s regarding the use of asbestos in cigarette filters. Without establishing any foundation that Mr. Comproni was qualified to give such an opinion, plaintiffs used his statement to demonstrate a level of knowledge which was undocumented by any contemporaneous scientific literature and unsupported by any expert witness at trial.

Plaintiffs offered no witness who could cite to any scientific study associating the use of Asbestos-containing consumer products with disease. According to plaintiffs' own expert, Dr. Nicholson, the state of knowledge at the time regarding the hazards of asbestos related only to intense life-long occupational exposures. (R.T., at 807-09, CCR Exhibit B, Tab 6). Thus, plaintiffs were permitted to employ Mr. Comproni's testimony regarding his alleged state of mind decades ago – a man with no specialized knowledge or training – as the only evidence on this critical issue. Because Mr. Comproni was unqualified to render the opinion which plaintiffs were then able to rely upon before the jury, defendants were unduly prejudiced. As a result, the admission of the Comproni testimony precluded defendants from receiving a fair trial.

B. The Weight Of The Evidence Presented At Trial Was Insufficient To Justify The Jury's Finding That H&V Was Negligent [CCP 657(6)].

1. The Court Must Weigh the Evidence and Must Draw Its Own Conclusions.

When ruling on a motion for new trial premised on a claim of insufficiency of the evidence, the court not only has the right, but an affirmative duty and obligation, to weigh the evidence presented on the issue in question independently. *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46. In weighing and evaluating the evidence, the Court is not bound by factual resolutions made by the jury. *Candido v. Huitt* (1984) 151 Cal. App. 3d 918, 923. The court may grant a new trial even if there is sufficient evidence to sustain the jury's verdict on appeal, so long

as the court determines that the weight of the evidence is against the verdict *Id.*

The Court in evaluating a motion for new trial, must independently weigh the evidence and formulate its own conclusions regarding the credibility of each witness. *People v. Robarge* (1953) 41 Cal. 2d 628, 634. If, after weighing the evidence, the Court is convinced from the entire record of credible evidence that the jury should have reached a different verdict or decision, a new trial should be ordered. Code of Civil Procedure § 657; *Tice,* 102 Cal. App. 2d at 46.

2. Plaintiffs Failed to Show that the Risks of Harmful Health Effects Associated with the Use of an Asbestos-Containing Filter Was Known or Knowable.

As the Court instructed the jury, plaintiffs' negligence claim required a showing that H&V did something which a reasonably prudent person would not do under the circumstances similar to those shown by the evidence. (R.T., at 2221, CCR Exhibit B, Tab 7). Here, plaintiffs were required to demonstrate by a preponderance of evidence that defendants knew or should have known of the harmful health effects associated with an Asbestos-containing filter between 1952 and 1956. Plaintiffs offered no testimony or studies which suggested that medical science believed such a danger existed during this period. Moreover, defendants offered evidence demonstrating that the American Medical Association *praised* the Asbestos-containing filter as the most effective cigarette filter on the market in a 1953 article. The jury apparently ignored the

evidence on this issue and assigned a standard of care incorporating today's knowledge of asbestos to the actions defendants took over 40 years ago. Given plaintiffs' utter lack of "state-of-the-art" evidence and defendants' evidence establishing no such contemporaneous knowledge existed, the weight of the evidence does not support the jury's verdict.

a. Defendants' "State-of-the-Art" Expert Failed To Demonstrate the Requisite Medical Knowledge During the Relevant Period.

To establish what was known during the early and mid-1950s, plaintiffs offered one expert witness, William Nicholson, M.D. Dr. Nicholson testified on direct examination that he was conversant with the major studies associating asbestos with disease and that there were some pre-1956 published studies. (R.T., at 790-91, CCR Exhibit B, Tab 8). On cross-examination, however, Dr. Nicholson revealed that the studies he referenced concerned only life-long extensive occupational exposures to asbestos:

> Q. Let me ask you a couple questions about asbestos and disease. The people who were studying asbestos and disease before 1960 were studying it in the workplace. Isn't that right?
>
> A. Largely so.
>
> Q. And, in fact, what you have described in one of your papers as the landmarks in asbestosis disease all dealt with asbestos exposure in the workplace to people working with either raw asbestos or manufacturing asbestos into other asbestos products?

A. Or using asbestos products certainly in the sixties.

(R.T., 804, CCR Exhibit B, Tab 8). Dr. Nicholson further conceded that, through the late 1960s, asbestos was commonly used in a host of consumer products:

Q. And throughout this entire time [up to 1969] asbestos was being used in building materials?

A. Yes.

Q. And consumer products?

A. Yes.

(R.T., at 808, CCR Exhibit B, Tab 8).

Plaintiffs offered no evidence from which even an inference can be drawn that the pre-1956 medical and epidemiological knowledge demonstrated an association between the use of Asbestos-containing consumer products and disease. In fact, plaintiffs' own expert acknowledged that asbestos was a common ingredient in many different consumer products during this period. The evidence presented at trial simply failed to establish that defendants knew or could have known of dangers inherent in an Asbestos-containing cigarette filter and, as such, plaintiffs did not present sufficient evidence to justify a finding of negligence.

b. Defendants Provided Additional Evidence Conclusively Showing The Lack of Knowledge During the Relevant Years.

In addition to plaintiffs' failure to satisfy their burden of proof on the negligence claim, defendants affirmatively disproved the notion that medical science was aware that the Asbestos-containing cigarette filter posed any potential for harm. Again, plaintiffs' own witness confirmed that the Journal of the American Medical Association ("JAMA") published an article evaluating various cigarette filters in 1953 which described the use of Asbestos-containing filter material. (R.T., at 833, CCR Exhibit B, Tab 9). Dr. Nicholson further confirmed that the 1953 JAMA article made no mention of any potential or theoretical health concerns related to the use of asbestos in cigarette filters. (R.T., at 834, CCR Exhibit B, Tab 9). Given this statement in 1953 by one of the world's leading medical journals, and the complete lack of contemporaneous medical evidence, plaintiffs failed to establish this crucial element of their negligence claim and the Court should grant a new trial.

C. The Inclusion Of Causes Of Action For Fraud Against Hollingsworth & Vose Company Without Having Been Pled And In The Absence Of Any Supporting Evidence Was Prejudicial Error [CCP 657(1) AND CCP 657(7)].

1. Plaintiffs Never Pled a Fraud Claim Against Hollingsworth & Vose Company.

In plaintiffs' First Amended Complaint, the Seventh Cause of Action sets out the only claim for fraud:

> AS AND FOR A FURTHER SEVENTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FRAUD, PLAINTIFF MILTON J. HOROWITZ *COMPLAINS OF DEFENDANT, LORILLARD, INC. AND FORTIETH DOE THROUGH FIFTIETH DOE,* INCLUSIVE, AND EACH OF THEM, AND ALLEGED AS FOLLOWS:. . . .

(First Amended Complaint, at 14, CCR Exhibit C) (emphasis added). Conspicuously, plaintiffs did not assert a cause of action for fraud against Hollingsworth & Vose Company ("H&V"). Moreover, at no time during discovery or during trial did plaintiffs move for leave to amend their First Amended Complaint. *In no way did plaintiffs provide H&V with notice that they intended to proceed against H&V under the fraud claims.* In fact, it was not until all parties had rested, during a discussion of the proposed Special Verdict Form, that plaintiffs made known their intent to pursue fraud claims against H&V. (R.T., at 2071, CCR Exhibit B, Tab 10).

H&V then made a timely objection to its inclusion in the Special Verdict Form questions addressing the fraud claims. The Court nonetheless allowed the claims to go to the jury against H&V:

> MR. BRAKE: . . . There is no fraud claim asserted against Hollingsworth & Vose. The first inkling that I can recall of a fraud claim against Hollingsworth & Vose is the inclusion of the company name in the questions, in plaintiffs propose [sic] special verdict.
>
> . . . This should be dismissed by nonsuit, didn't plead as none (sic), not plead with, not

> only not with particularity, but plead it at all. I wasn't on notice they were proceeding with it.
>
> It shouldn't have to have it submitted to the jury.
>
> * * *
>
> THE COURT: Okay. All right. I will denied (sic) all the motions for nonsuit.

(R.T., at 2071, 2074, CCR Exhibit B, Tab 10).

The complaint in a civil action serves two functions, both fundamental to the preparation and trial of a civil action: (1) it frames and limits the issues; and (2) it apprises the defendant of the basis upon which the plaintiff is seeking recovery. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 211-212. This requirement is particularly stringent with respect to claims grounded in fraud. Fraud claims must be pled with particularity so as to "furnish the defendant with certain definite charges which can be intelligently met." *Id.* at 216 (quoting *Lavine v. Jessup* (1958) 161 Cal. App. 2d 59, 69).

Here, plaintiffs expressly did not plead a fraud claim against H&V Plaintiffs, therefore, failed to provide definite averments against which H&V could defend at trial. Because plaintiffs did not make their intention to pursue the fraud claims known until all parties had rested, H&V had no meaningful opportunity to defend these claims. Including H&V on the Special Verdict Form's fraud questions and allowing the fraud claims to be submitted to the jury without plaintiffs having pled or otherwise argued the claims is a *per se* violation of the rule requiring these

claims be pled – and pled with particularity. H&V was unduly prejudiced and denied a fair trial.

To allow the claim to be tried and submitted in this manner has the effect of rendering the pleading requirements non-existent and depriving H&V of any meaningful opportunity to defend the non-pled claims.

2. Even If Plaintiffs Had Provided Sufficient Notice of Their Intent To Proceed Against H&V for Fraud, They Presented No Evidence Sufficient To Justify the Jury's Verdict against a Component Part Manufacturer.

Even if plaintiffs had asserted their fraud claims against H&V, there was insufficient evidence to justify submitting the claim to the jury. As the Court instructed the jury, a claim of fraud by concealment requires a showing that: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact of the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) the concealment or suppression of the fact caused the plaintiff to sustain damage. (R.T., at 2223, CCR Exhibit B, Tab 11).

It was an undisputed fact at trial that H&V Specialties ("Specialties"), an H&V subsidiary, was a component part manufacturer that created filter media used in Kent cigarettes. Specialties did not manufacture cigarettes, never distributed cigarettes, and never advertised.

Specialties manufactured the filter media into bulk rolls, and shipped the filter media to Lorillard.

Plaintiffs presented no evidence whatsoever that H&V or Specialties were involved in any capacity in the manufacture, distribution, marketing, or, most particularly, advertising of Kent cigarettes. A "fraud" clam cannot be stated under the heading of concealment because Specialties, as the component supplier, had no fiduciary or confidential relations to plaintiff creating a duty to disclose any facts to consumers of Kent cigarettes. *See La Jolla Village HomeOwners' Association, Inc. v. Superior Court of San Diego County* (1989) 212 Cal. App. 3d 1131, 1152 (precluding cause of action for fraud based on concealment as to subcontractor for lack of duty). Because Specialties's involvement was as a supplier to Lorillard, plaintiffs could not and did not present any evidence sufficient to establish that H&V intended to induce action by plaintiffs. Hence, any "concealment" fraud claim should not have been submitted to the jury.

3. The Inclusion of Hollingsworth & Vose Company on the Special Verdict Form's Fraud Questions Resulted In Undue Prejudice and Precluded H&V From Receiving a Fair Trial.

As a component part supplier, Specialties made no representations to the public. specialties had neither input into nor control over any Kent cigarette advertising. Plaintiffs introduced absolutely no evidence to the contrary. Although the fraud claims were not asserted in plaintiffs' First Amended Complaint, and although plaintiffs introduced no supporting evidence, and over H&V's

timely objection, the Court ordered that the Special Verdict Form include H&V on the following questions:

No	Question
8	Did a defendant make a representation as to a past or existing material fact?
9	Was the representation false?
10a	Did the defendant know that the representation was false when it made it?
10b	Did the defendant make the representation recklessly without knowing whether it was true or false?
10c	Did the defendant make the representation without any reasonable grounds for believing it to be true?
11	Did the defendant make the representation with an intent to defraud the plaintiff?
16	Did defendant conceal or suppress a material fact?
17	Did the defendant intentionally conceal or suppress the fact with the intent to defraud the plaintiff?
20	Did defendant's concealment or suppression of the fact cause plaintiff damage?

Although plaintiffs presented absolutely no evidence of any representation made by H&V, the jury answered "Yes" to questions 8, 9, 10b, 10c, and 11. (R.T., at 2268-69, CCR Exhibit B, Tab 12). Although plaintiffs presented no evidence or argument concerning H&V's duty to consumers of Kent cigarettes, a product which H&V had no

role in manufacturing, distributing, marketing, or advertising, the jury answered questions 16, 17, and 20 "Yes" with respect to H&V. (R.T., at 2270, CCR Exhibit B, Tab 12). As the jury's verdict demonstrates, the Court's failure to grant H&V's motion for nonsuit on the unsupported and unpled fraud claims resulted in undue prejudice and precluded H&V from receiving a fair trial.

Moreover, having summarily determined that H&V was liable for "fraud," the jury went on to find, by clear and convincing evidence, that H&V was guilty of "malice, oppression, or fraud," and awarded plaintiffs $140,000 in punitive damages against H&V. The inclusion of the fraud questions motivated the punitive damage verdict. Having determined the existence of "fraud" (despite the absence of evidence), the jury went straight to a finding sufficient to justify an award of punitive damages. Had H&V been removed from the Special Verdict Form's fraud questions, as the law and evidence required, it is likely that the jury would not have found malice, oppression, or fraud.

III.

CONCLUSION

Based on the foregoing arguments and Lorillard's Memorandum of Points and Authorities in Support of Its Motion for New Trial, defendant Hollingsworth & Vose Company respectfully requests this Court to grant its motion and order a new trial.

Dated: October 20, 1995

PREUSS WALKER & SHANAGHER

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APPENDIX B

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

MILTON J. HOROWITZ and SHIRLEY HOROWITZ Plaintiffs, v.	No. 965245 **REPLY OF HOLLINGSWORTH & VOSE COMPANY TO PLAINTIFFS' OPPOSITION TO HOLLINGSWORTH & VOSE'S MOTION FOR A NEW TRIAL**

RAYBESTOS -MANHATTAN, INC., et al. Defendants.	Date:	November 6, 1995
	Time:	2:00 p.m.
	Dept.:	1 (TBA)
	Judge:	Winton McKibbon (X-5)

(Filed Nov. 3, 1995)

In their Opposition, plaintiffs maintain that Hollingsworth & Vose ("H&V") should not be granted a new trial because: (1) there was sufficient "foundation" for the admission in evidence of Elise Comproni's expert opinion about the knowledge of asbestos-related disease in the 1950's; (2) that plaintiffs were entitled to pursue a fraud claim against H&V even though they failed to plead any such claim; and (3) even if submission of the fraud claim to the jury was in error, it was "harmless error" as there was no prejudice to H&V. H&V briefly replies to each of these contentions.

1. **Comproni's "Testimony" Prejudiced H&V's Right To A Fair Trial.**

Elise Comproni – who in October 1952 was a first year employee at the Massachusetts Department of Industrial Hygiene – gave an opinion about what was supposedly "knowable" in 1952 about the hazards of asbestos with no demonstrated basis of expertise. Comproni's actual testimony makes clear he had no competency to give this opinion. According to Comproni, lung cancer was a "known" effect from asbestos exposure. The source of his information was supposedly the Library of the Massachusetts Agency at which he worked. In fact, the record is clear that Comproni could not specifically

outline any specific basis for his opinion. Deposition of Elise Comproni ("Comproni Dep.") at 56:1-19; 57:4-10; 58:1-16; and 61-63, attached as Exhibit A to the Declaration of Cynthia C. Roenisch ("Roenisch Decl."). The fact is that other than a general reference to his superiors and the library, Comproni knew nothing of substance about the question of asbestos and cancer. Comproni Dep. at 63:12-22, Roenisch Decl., Exhibit A.

By virtue of his having visited the H&V Specialties plant in 1952, Mr. Comproni makes a convenient trojan horse for an improper opinion that he is without the knowledge to render.

2. The Submission of Plaintiffs' "Fraud" Claim To The Jury Requires A New Trial.

Plaintiffs concede they pled no fraud claim against H&V, but claim H&V was nonetheless "on notice" of the claim essentially because it was supposedly referred to in opening statements. Plaintiffs then argue that this "variance" between the pleading and proof is not to be deemed material since there was no prejudice to H&V.

Plaintiffs did nothing to place H&V on notice it specifically faced a fraud claim. On the contrary, *plaintiffs never stated, by pleading or otherwise, that they were seeking to hold H&V liable for Lorillard's advertisements.* Counsel did not state in her opening statement that she intended to try this fraud claim against H&V. Plaintiffs offer no record citation on this point because there is none. Instead, plaintiffs' counsel made references in opening statement to "the defendants" "advertisements" and in "their TV

advertising" presumably referring to Lorillard's advertisements for Kent cigarettes. Reporter's Transcript ("R.T.") at 358, Roenisch Decl., Exhibit B. But H&V had no advertisements – and did not advertise on television. The elliptical references during opening statement, placing Lorillard and H&V together, cannot constitute putting a defendant on notice that the fraud claim is part of the case.

Indeed, the case law under CCP § 469 requires that for amendment to be allowed at trial, the unpled claim must be "thoroughly explored during trial and the theory of the trial well known to court and counsel." *Brickman v. Parliament Escrow Corporation,* 190 Cal. App. 3d 1051 (1987) (citing *Duncan v. Sunset Agricultural Minerals,* 273 Cal. App. 2d 489 (1987)). No fraud claim seeking to hold H&V liable for Lorillard's advertising was "well known" or "thoroughly explored" during trial. The notion the fraud claim was understood by H&V to be part of the case is demonstrably absurd.

Instead, plaintiffs would construe the rule allowing amendment of a pleading to conform to the evidence, into a wholesale abrogation of the rule that fraud claims must be plead [sic] with specificity. The fact is that fraud must not only be plead [sic] – but as the Supreme Court of California has said – it must be *"specifically alleged."* (Emphasis added) *Lavine v. Jessup,* 161 Cal. App. 2d 59 (1958).

Plaintiffs scrupulously avoided "specifically alleging" the fraud claim against H&V depriving H&V of its ability to defend the case. Plaintiffs' ultimate contention was that H&V committed fraud through Lorillard's

advertisements – and that H&V should be responsible for these advertisements as a "joint venturer." By avoiding pleading the claim, however, and raising this joint venturer argument for the first time upon motion for non-suit, plaintiff was able to proceed to trial on the claim while using a wholly incorrect legal standard. H&V, only learning of this joint venturer theory after the close of the evidence, did not have the time or the ability to defend this claim.

Plaintiffs then claimed in their closing argument that liability should be imposed on H&V, as well as Lorillard because "these two companies were in this thing together." R.T. at 2087, Roenisch Decl., Exhibit B. Now, in their brief on this motion, plaintiffs make the same "joint venturer" claim. (Pl. Opp. at 13.)

Under California law a joint venture exists when the parties have *joint control* of the enterprise and of each other's actions – it is not sufficient that they merely have plans in common. *Christianson v. Superior Court*, 54 Cal. 3d 868 (1991). Each venturer must be able to be considered the agent of the other in the business transaction. *Cahill Bros., Inc. v. Clementina Co.*, 208 Cal. App. 2d 367 (1962).[1]

Here, the plaintiffs cannot seriously contend that H&V had *any* control – much less *joint* control – over Lorillard's sale of Kent cigarettes. Plaintiff could not

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[1] In determining whether a joint venture exists, California courts also look to the expression of the parties in the written agreement. *Gurewitz v. Kindir*, 96 Cal. App. 3d 460 (1979). Here, as was pointed out upon motion for non-suit, the agreement specifically states it is not intended to create a joint venture. Pl. Ex. 115, R.T. at 2072, Roenisch Decl., Exhibit B.

prove a joint enterprise claim under California law – so they did not plead the claim. Then, at trial, rather than meet the standard that the law sets for joint enterprise liability in fraud (i.e. joint control), plaintiffs' counsel ignored the law, and simply instructed the jury to impose joint liability upon the glib assertion that H&V and Lorillard "were in it together." Moreover, plaintiffs' counsel argued this for *all* claims in the case, not only fraud and punitive damages: "[a]ll my remarks go as well to H&V because they were in this together." R.T. at 2087, Roenisch Decl., Exhibit B.

This should not have occurred. The joint enterprise and fraud claim should have been pled with specificity. BAJI has a specific instruction, 13.40, requiring a finding that each party has *"an equal right of control, that is, to direct and govern the conduct of the other as to the common undertaking.*[2] (Emphasis added) Plaintiffs should have been required to meet this standard. Instead, they instructed the jury that joint liability may be imposed because the defendants "are in this together" – a demonstrably incorrect statement of law.

In summary, H&V was prejudiced for three reasons. First, H&V did not know of, and did not defend the "joint enterprise" theory of fraud liability. Second, as a consequence of this lack of notice, plaintiff was able to proceed

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[2] In making the non-suit motion, counsel to H&V pointed out to the Court the correct "joint control" standard for establishing a joint venture – and asserted that *as a matter of law* plaintiff could not meet the standard. *See* R.T. at 2071-73, Roenisch Decl., Exhibit B.

on a joint enterprise theory – without regard to the correct legal standard. Third, the jury having found H&V to have acted fraudulently on this incorrect theory of law, proceeded to award damages, including punitive damages against H&V.

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